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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN EARL COOK,

Defendant and Appellant.

C057804

(Super. Ct. No.  
CRF07-397)

Convicted following a court trial of threatening to kill his family, defendant Brian Earl Cook appeals, contending the trial court abused its discretion in imposing the upper term of three years for making criminal threats. (Pen. Code, § 422.) We find no abuse of discretion and affirm the judgment.

BACKGROUND

Defendant is a 40-year-old man with limited education and a history of mental health problems. He lived with his mother, stepfather and brother.

One day, defendant became upset after his mother questioned why he used spray paint on his new shoes. He left the room for

a while; when he returned, his mother, stepfather and brother were in the room, and defendant had a butcher knife. Defendant did not brandish the knife, but set it down on the loveseat and said, "I'll kill you all."

Defendant's stepfather left the room and called the sheriff's department.

The evidence at trial was mixed on the issue of how frightened defendant's family members were by his statements. Defendant's mother testified she did not "seriously" believe he would hurt them, even if he were not taking his medication. Defendant's stepfather testified he was "not really" afraid because defendant had previously made threats against his family that he failed to act upon. But he also testified he was "scared" by defendant's threat and "thought [defendant] would do something."

The deputy who responded to the call testified at trial that defendant's stepfather, who he had met previously, said he was afraid, "looked visibly scared" and appeared to be "shaking a lot more" than he normally does.

The court found defendant guilty of having made a criminal threat. It then imposed the upper term sentence of three years in prison, after indicating its intention to do so "based on [defendant's] history, particularly thinking of [California Rules of Court,] Rule [4.]410 and the need for protection of his family[.]"

## DISCUSSION

Defendant contends the trial court abused its discretion by imposing the upper term, because "the record does not support the court's stated reasons for imposing the upper term." He is mistaken.

As noted by the California Supreme Court, a defendant's criminal history can be used by a court in sentencing a defendant without violating the defendant's right to a jury trial. (*People v. Black* (2007) 41 Cal.4th 799, 818-820.) Moreover, we note that defendant was sentenced after the Legislature amended Penal Code section 1170 to give the trial court broad discretion to impose the lower, middle or upper term by simply stating its reasons for imposing the selected term. Defendant's offense occurred on May 20, 2007, which is after the effective date of the change to the statute which became effective on March 30, 2007. (*People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2.) Under the amended law, trial courts may impose an upper term sentence without violating the defendant's right to a jury trial on the truth of factors used to impose the aggravated sentence. (*Id.* at pp. 844-852.)

Furthermore, a single factor in aggravation will support imposition of an upper term. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615.)

Of course, the aggravating factors relied upon by the court to impose an upper term sentence must be supported by the evidence in the record. (See *People v. Arbee* (1983) 143 Cal.App.3d 351, 356; *People v. Berry* (1981) 117 Cal.App.3d

184, 198.) Here, the support for the trial court's conclusion that defendant's criminal "history" justified imposition of the upper term sentence lies in the probation report, which is inherently reliable and which the court was required to consider. (See Pen. Code, § 1203, subd. (b); *People v. Arbuckle* (1978) 22 Cal.3d 749, 755.) The probation report shows that defendant's "history" includes a lengthy juvenile and criminal record dating from 1978, four state prison terms, and several probation and parole violations. Although many offenses were theft-, vehicle- or drug-related, several others involved violent or assaultive conduct. For example, in 1985, defendant threw a knife at his stepfather and received an assault with a deadly weapon juvenile adjudication; in 1989, he entered uninvited onto a neighbor's property, threatened to kill the neighbor and his family and resisted arrest by sheriff's deputies; in 1991, he was convicted of possessing or manufacturing a weapon in prison; and in 1997, he was convicted of battery on a custodial officer. Moreover, defendant admitted to the probation officer preparing the presentence report that he previously threatened to burn down his family's house.

We find no error in the trial court's imposition of an upper term sentence.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, J.

We concur:

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SCOTLAND, P. J.

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SIMS, J.